



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 31, 1994

Ms. Cynthia Hellstern
Assistant County and District Attorney
Ellis County Courthouse
Waxahachie, Texas 75165-3759

OR94-233

Dear Ms. Hellstern:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 23765.

The Ellis County and District Attorney's Office received an open records request for all records contained in a particular case file pertaining to a burglary prosecution that was discontinued because of an illegal search. You have submitted to this office as responsive to the request a six page "Prosecution Report" prepared by the Ennis Police Department, photocopies of certain documents that were stolen during the course of the burglary, an Ennis Police Department "Property Release Form" listing the stolen items that were recovered, and an executed arrest warrant. You contend that the requested records come under the protection of former sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act (now found at sections 552.101, 552.103, and 552.108, respectively, of the Government Code).

You contend that because the "Prosecution Report" constitutes privileged work product it is deemed confidential by law and is therefore excepted from required public disclosure under former section 3(a)(1). Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In the context of open records requests, the work product doctrine merely represents one aspect of section 552.103 of the Government

¹The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

Code (former section 3(a)(3) of the Open Records Act). Attorney work product may be withheld only if it "relates" to litigation to which the governmental entity is or may be a party. *See* Open Records Decision No. 574 (1990) (copy enclosed); *see also* Open Records Decision No. 575 (1990). In this regard, you contend:

Even though the original case has been dismissed because certain evidence was acquired during an invalid search, there may be sufficient admissible evidence to allow the filing of other charges. Until all reasonable likelihood of litigation has passed, the requested report remains exempt from disclosure.

To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103. Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* You have not demonstrated that litigation regarding this matter is *probable* at this time. Consequently, you may not withhold these records as "work product."

Section 552.108 (former section 3(a)(8)), known as the "law enforcement" exception, provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement is excepted from [required public disclosure].

When a governmental body claims section 552.108, the relevant question this office must address is whether the release of the requested information would undermine a legitimate interest relating to law enforcement or prosecution. Open Records Decision No. 434 (1986). Whether disclosure of particular records will unduly interfere with law enforcement or crime prevention must be decided on a case-by-case basis. Attorney General Opinion MW-381 (1981). In this instance, you have not demonstrated why these records should be withheld under section 552.108. *See* Open Records Decision No. 582 (1990) at 3 (nebulous prospects of future prosecution cannot form a basis for section 552.108 protection). This exception does not apply to these records.

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 (1982) at 1, we will raise common-law privacy as incorporated into section 552.101

because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor. *See* Gov't Code § 552.352. Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has previously held that financial information, including a listing of an individual's assets and liabilities, normally comes under the protection of common-law privacy. *See* Open Records Decision No. 373 (1983). Accordingly, you must withhold the financial statement contained in these records. The remaining records must be released in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Rick Gilpin
Assistant Attorney General
Open Government Section

RG/RWP/rho

Ref.: ID# 23765
ID# 24685
ID# 24734

Enclosures: Open Records Decision No. 574
Submitted documents

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